IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG DIVISION

CHARLES W. FERGUSON,

Plaintiff,

v.

CIVIL ACTION NO.: 3:10-CV-00116JPB
(Formerly Civil Action No.: 10-C-107
In the Circuit Court of Mineral County)

JOHN DOE, and
NATIONAL CASUALTY COMPANY,

Defendants.

NATIONAL CASUALTY COMPANY'S RESPONSE TO PLAINTIFF'S MOTION FOR REMAND

Defendant National Casualty Company, ("National Casualty") by and through counsel, Lee Murray Hall, Eleni Kontos-Miller, and Jenkins Fenstermaker, PLLC, respectfully submits this Response to Plaintiff's Motion to Remand. As stated more fully below, plaintiff's Motion for Remand fails because the amount in controversy exceeds or is more than likely to exceed $75,000.

I. BRIEF STATEMENT OF FACTS

This action arises from Plaintiff Charles W. Ferguson's claims against National Casualty, his insurer, for breach of contract, common law bad faith, and violation of unfair claims settlement practice pursuant to W.Va. Code §33-11-1. Plaintiff filed a Complaint on October 29, 2010, in the Circuit Court of Mineral County, West Virginia, contending that he is entitled to compensatory damages, punitive and exemplary damages, statutory damages and remedies, fees, costs, and interest. National Casualty is a corporation incorporated under the laws of the Commonwealth of Wisconsin. Plaintiff is a resident of the State of West Virginia. By Notice dated November 24, 2010, National Casualty removed this matter to the United States District Court for the Northern District of West Virginia pursuant to 28 U.S.C. §1332 inasmuch as the parties are diverse in citizenship, and plaintiff claims a host of damages in excess of $75,000.

Plaintiff moved to remand this matter to the Circuit Court of Mineral County, West Virginia on December 13, 2010, claiming that the amount in controversy does not exceed $75,000.00. Given plaintiff's written demand of $90,000.00, his lost wage claim of $250,000.00 and medical bills exceeding $10,000.00, the matter in controversy exceeds the statutory requirement of $75,000.00.

For the reasons stated below, removal of this matter was and is proper. National Casualty filed a timely Notice of Removal, the parties are diverse in citizenship and the amount in controversy exceeds $75,000.00.

II. LAW AND ARGUMENT

1. Legal Standard for Diversity Jurisdiction

A defendant may remove a case from a state court to federal court if the action is one "of which the district courts of the United States have original jurisdiction." *See* 28 U.S.C.A. § 1441. Federal district courts have original jurisdiction over actions between citizens of different states in which the "matter in controversy" exceeds the value of $75,000.00. *See* 28 U.S.C.A. § 1332.

To determine the amount in controversy for purposes of evaluating the propriety of diversity jurisdiction, a court must first determine whether the Complaint, on its face, indicates that a plaintiff seeks damages in excess of $75,000. *Sayre v. Potts*, 32 F.Supp.2d 881, 883-84

(S.D.W.Va. 1999). If a defendant seeks to remove a matter on the basis of diversity jurisdiction and the Complaint is silent or ambiguous as to the amount of damages claimed, the defendant must prove by a preponderance of the evidence that the value of the matter in controversy exceeds the jurisdictional amount. *Landmark Corp. v. Apogee Coal Co.*, 945 F.Supp. 932, 935 (1996)(citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992); *Evans v. CDX Serv., Inc*, 528 F.Supp.2d 599, 606 (S.D.W.Va. 2007).

Further, the amount in controversy is not deemed as the sum ultimately awarded to the plaintiff, but rather, is the sum that is demanded by the plaintiff when the Complaint is filed. *Evans*, 528 F.Supp.2d at 605 (citing *Watson v. Blankinship*, 20 F.3d 383, 387 (10th Cir. 1994). To determine the sum that is demanded by the plaintiff when the Complaint is filed, a defendant may present evidence of the plaintiff's potential damages existing at the time of filing of the Notice of Removal including 1) the type and extent of the injuries alleged; 2) the possible damages recoverable; 3) amounts awarded in other similar cases; 4) the expenses and losses incurred; and 5) evidence of settlement demands. *Landmark*, 945 F.Supp. at 936.

In *Evans*, Mr. Evans filed a deliberate intent claim against his employer after sustaining a broken leg which required surgical repair. 528 F.Supp.29 at 601. Mrs. Evans filed a claim for loss of consortium. *Id.* Mr. Evans sought damages for, *inter alia*, bodily injury, pain and suffering, loss of wages, loss of earning capacity, loss of ability to perform household services, and loss of ability to enjoy life. *Id.* The Evans' Complaint, however, did not plead a specific amount of damages sought. The District Court found, to a preponderance of the evidence, that plaintiff's claims for "bodily injury," "tremendous pain and suffering," "loss of earning capacity," and "loss of ability to enjoy life," supported the defendants' contention that plaintiffs had placed at least $75,000 in controversy. *Id.* at p. 606. Moreover, the District Court concluded that the "additional elements of pain and suffering and future damages [...] easily [lead one to] conclude the amount in controversy is satisfied." *Id.* (citing *Campbell v. Rests. First/Neighborhood Rest. Inc.*, 303 F.Supp. 2d 797, 799 (S.D.W.Va. 2004).

2. Plaintiff's Written Demand, Lost Wage Claim and Medical Bills all Demonstrate that His Alleged Damages Exceed $75,000.00.

Plaintiff's bad faith case arises out of a February 26, 2009 accident, in which plaintiff was hauling a load of logs through Mineral County. *Complaint., attached as Exhibit 1*, at ¶4. Plaintiff jackknifed his truck and trailer when he dropped his truck into a ditch along the roadway. *Ex. 1* ¶6. He alleges that the accident was caused by a phantom vehicle. *Ex. 1* ¶7. Plaintiff claims "multiple injuries, including injury to his shoulder, multiple cuts, bruises and abrasions, and [that he] developed post traumatic stress syndrome to the point where his physician and psychiatrist required him to stop driving." *Ex. 1* ¶8 (*emphasis added*). As plaintiff is a truck driver, he claims to have "suffered, and continues to suffer, substantial loss of income." *Ex 1* ¶9 (*emphasis added*).

In this suit, Plaintiff plaintiff alleges the following:

- Compensatory damages for breach of contract, common law bad faith, and violation of the Unfair Claims Settlement Practice Act stemming from an underlying auto accident, which allegedly caused:

  (1) Physical injuries including shoulder injury, cuts, bruises, and abrasions;

  (2) Post traumatic stress disorder requiring plaintiff to stop driving; and

  (3) Past and future lost income resulting from his inability to work as a truck driver.

- Punitive and exemplary damages for common law bad faith and violation of the Unfair Claims Settlement Practice Act.

With regard to the medical bills, Plaintiff alleges "multiple injuries" including shoulder injury, cuts, bruises, and abrasions. *Ex.1*. Based on pre-suit documents provided by plaintiff, National Casualty understands that his medical bills relating to this accident total $10,247.97. *See Exhibit 2.*

Further, at the time of filing the Notice of Removal, Plaintiff had provided a past lost wage estimate which alone exceeded $250, 000.00:

$2,075/week from Brownie Mountain Lumber ($124,500)
$2,100/week from Luke Paper Company ($126,000)
Total claimed lost wages: $252,000 over 15 months

Ex. 3.[1] Plaintiff's own allegation of lost wages claims far exceeds the $75,000 removal threshold.

Finally, plaintiff submitted a written demand of $90,000.00 less than six weeks before suit was filed. See Exhibit 4. Even taken alone, these damages exceed $75,000.00. However, when combined with the claimed compensatory and punitive damages associated with the bad faith claim, there is no doubt that plaintiff's alleged damages exceed the jurisdictional minimum.

The United States District Court for the Southern District of West Virginia found it "facially apparent that the amount in controversy is likely to exceed" $75.000 based on claimed medical expenses of $11,000, past and future lost wages claims, pain and suffering, loss of earning capacity, and loss of enjoyment of life allegations. *Larson v. Actavais, Inc.*, 2010 U.S. Dist. LEXIS 14435 (S.D.W.V. 2010). The Court reminded the parties that "in reaching a conclusion with regard to the amount in controversy based upon this evidence, the court 'is not required to leave its common sense behind.'" *Id* at 12 (*internal citations omitted*).

As in *Larson*, plaintiff's allegations are facially sufficient to support jurisdiction under 28 U.S.C. 1332. However, as additional proof, the Court may consider relevant documents. Plaintiff's medical bills, his own calculation of lost wages and his demand satisfy the jurisdictional minimum. *See Ex.2, Ex.3, and Ex. 4.*

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[1] National Casualty disputes liability for, causation for, and the amount of the claimed damages.

While there is ample basis to find that removal is appropriate, if this Court decides to remand this action it should not also award attorney fees to plaintiff. West Virginia federal courts have considered whether an attempt to remove a "case to federal court appears to have been objectionably reasonable…[and whether the removing party] acted in bad faith" when evaluating whether to award attorney fees. Morrison v. Standard Ins. Co., 2010 U.S. Dist. LEXIS 97298 (S.D.W.V. 2010). The decision to award attorney fees is discretionary under 28 U.S.C. § 1447(c). National Casualty's removal was reasonable and, clearly, not filed in bad faith given the documents provided by plaintiff to National Casualty in the months preceding suit. Accordingly, this Court should not award plaintiff any fees or costs related to this removal.

III. CONCLUSION

This Court is the proper forum to hear this matter. Plaintiff's Motion to Remand must be denied because (1) Plaintiff concedes complete diversity of citizenship and (2) the amount in controversy exceeds $75,000.

WHEREFORE, for the foregoing reasons, National Casualty Company respectfully requests that this Court deny Plaintiff's Motion to Remand.

NATIONAL CASUALTY COMPANY,
By Counsel

/s/ Lee Murray Hall

Lee Murray Hall, Esquire (WV Bar #6447)
Eleni Kontos-Miller, Esquire (WV Bar #9949)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, WV25722-2688
Telephone: (304) 523-2100
Fax: (304) 523-2347

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CERTIFICATE OF SERVICE

I, counsel for National Casualty Company hereby certify that I electronically filed the foregoing "***National Casualty Company's Response to Plaintiff's Motion to Remand***"with the Clerk of the Court on this the 27th day of December 2010 using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Nelson M. Michael
Kelly A. Khun
PO Box 59
126 East Street
Keyser, WV26726
(*Counsel for Plaintiff*)

/s/ Lee Murray Hall
Lee Murray Hall, Esquire (WV Bar #6447)
Eleni Kontos-Miller, Esquire (WV Bar #9949)

JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, WV 25722-2688